real, because of the rule that the owner of property abutting on the street has the right to have vehicles stand in front of his property for such reasonable time as is necessary for loading and unloading them, even though in the exercise of such right the passage of street cars is impeded. Raffer *v.* Central Traction Co., 147 Pa. St. 579, 30 Am. St. Rep. 763. See note to Ashland, etc., R. Co. *v.* Faulkner (Ky.), 43 L. R. A. 557.

TAYLOR *v.* BALTIMORE & O. R. CO.

Nov. 19, 1908.

[62 S. E. 798.]

1. Appeal and Error (§ 1068*)—**Harmless Error—Erroneous Instructions.**—A plaintiff, not entitled to recover in any view of the case, is not prejudiced by an erroneous instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4227; Dec. Dig. § 1068.*]

2. Master and Servant (§ 268*)—**Injury to Servant—Relation of Master and Servant—Evidence.**—Where, in an action against a railway company for injuries to one employed by a freight conductor to help unload cars, it appeared that the rules of the company denied to its freight conductors the power to employ help, evidence of the custom of other railroads as to the authority of freight conductors in such cases was inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 268.*]

3. Master and Servant (§ 277*)—**Injury to Servant—Relation of Master and Servant—Evidence.**—Where, in an action against a railway company for injuries to one employed by a freight conductor to assist in unloading a car, an express grant of the power of the conductor to employ help was disproved, and the employment from necessity was neither averred nor proved, there could be no recovery on the ground of the existence of the relation of master and servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.*]

4. Railroads (§ 17*)—**Authority of Servant—Power of Railroad Conductors.**—The authority of a railroad conductor extends, ordinarily, to the control of the movements of his train and of the employees engaged in operating it; but his authority does not, ordinarily, extend to the making of contracts on behalf of the company, except in cases of urgent emergency.

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 37; Dec. Dig. § 17.*]

5. Master and Servant (§ 1*)—Existence of Relation—Volunteer.—A volunteer cannot charge a railroad with the duty of an employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 1.*]

6. Master and Servant (§ 1*)—Existence of Relation.—Where a freight conductor called to a third person to assist him in unloading cars at a station, because his train was late and his men were out of place, and the third person complied with the request, the existence of the relation of master and servant did not exist between the railroad company and the third person; the third person performing the work without either promise or expectation of reward.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 1.*]

Error from Circuit Court, Rockbridge County.

Action by W. O. Taylor against the Baltimore & Ohio Railroad Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Glassgow & White, for appellant.
Bumgardner & Bumgardner, for appellee.

WHITTLE, J. The plaintiff gives substantially the following version of the happening of the accident which caused the injury for which he demands damages: As he was passing a freight train of the defendant in error, unloading freight from a siding into its wareroom at East Lexington, the conductor called out to him: "Jump up here, Bill, and help me check this out. I am late, and my men are out of place." He complied with the request, and in pushing a truck across the gangplank from the door of the wareroom to the door of the car for the first load the gangplank tilted, precipitating him to the ground, a distance of several feet, and the heavy truck, falling upon his hand, cut it off. He ascribes the accident to the circumstances that the door of the car was not precisely opposite the wareroom door and that the sill of the latter was worn from use and uneven. He moreover insists that by reason of what passed between him and the conductor the relation of master and servant was established, and the master was guilty of actionable negligence in failing to exercise ordinary care to provide him with a reasonably safe place in which to work.

The declaration avers that the conductor had authority to engage the services of the plaintiff for the purpose indicated, and

*See foot-note on preceding page.

that the plaintiff, for the benefit of the defendant, "as a matter of accommodation," complied with the request.

The trial court instructed the jury that under the allegations of the declaration and proof the plaintiff was a mere volunteer and that the defendant owed him no other duty than that of not inflicting willful injury upon him.

There was a verdict and judgment for the defendant, which judgment we are called on to review.

The pivotal question in the case, therefore, is: Did the relation of master and servant exist between the parties? If that question is to be answered in the negative, it matters not that the circuit court practically directed a verdict for the defendant (which it is conceded is not in accordance with the accepted practice in this state); for it is the well-settled rule of this court that, where it appears that the plaintiff is not entitled to recover in any view of the case, he cannot have been prejudiced by an erroneous instruction. Leftwich *v.* City of Richmond, 100 Va. 164, 40 S. E. 651; Brock *v.* Bear, 100 Va. 562, 42 S. E. 307; Moore *v.* B. & O. R. Co., 103 Va. 189, 48 S. E. 887; Bugg *v.* Seay, 107 Va. 648, 60 S. E. 89; Hanger *v.* Com'th, 107 Va. 872, 60 S. E. 67.

On the trial the book of rules of the company was introduced by the plaintiff, and it showed that freight conductors had no express authority to employ servants. The testimony of the superintendent of that division of the road also showed affirmatively that the conductor possessed no such authority.

In this connection it may be remarked that the court did not err in excluding evidence of the general rule and custom of railroads with regard to the authority of freight conductors, in their discretion, to employ help. The rule of this company denied that authority to its freight conductors, and hence it could not be bound by proof of the existence of a contrary custom among other railroads. It is true that such authority may arise either from express delegation or, by implication, from necessity; but in this instance, as we have seen, an express grant of authority is disproved, and agency from necessity is neither averred nor shown.

In Elliott on Railroads the author says: "The authority of the conductor ordinarily extends to the control of the movements of his train, and to the immediate direction of the movements of the employes engaged in operating the train. * * * His authority does not, ordinarily, extend to making contracts on behalf of the company; but there may be cases of urgent emergency where he may make a contract for the company. He is to administer the rules of the company, rather than make contracts for it. * * * The conductor has no general authority to make contracts on behalf of the company; but he may in rare cases of necessity, when circumstances demand it, bind the company by

such contracts as are clearly necessary to enable him to carry out his prescribed duties." 1 Elliott on Railroads (2d Ed.) § 302.

The same author, on the subject of "Volunteers," declares that "the overwhelmin weight of authority sustains the doctrine that a volunteer cannot charge a railroad with the duty of an employer." 3 Elliott on Railroads (2d Ed.) § 1305.

In the case of Vassor *v.* A. C. L. R. Co., 142 N. C. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950, the Supreme Court of North Carolina in an able opinion abundantly sustained by authority, holds that where the "plaintiff boarded the defendant's local freight train, and asked the conductor in charge if he could come back with him the next day on his train, and the conductor replied that he could, and that he was to help unload and load freight, and plaintiff boarded the train on the next day, was discovered by some of the trainmen, and was injured by the explosion of the engine shortly thereafter, held, the conductor had no authority to employ the plaintiff as a servant, or permit him to work his passage on the train, and hence the carrier owed plaintiff neither the duty of a passenger nor employee."

So, in Railway Co. *v.* Propst, 85 Ala. 203, 4 South. 71, where the conductor requested the plaintiff, a passenger, to assist in coupling a car, accosting him thus, "Will, come here and make this coupling for me," the court said: "Such order or direction, as averred, is entirely without the routine of the conductor's duties, and could not, by its abuse, fasten a liability on the railroad corporation. * * * More is essential than a mere order or request to couple cars at one time and place, or doing a single act, to constitute an employment within the scope of the implied authority of the conductor. It must be to render service to some extent continuous in its nature."

Our attention has been called to other authorities of like import, but those to which we have referred sufficiently illustrate the principle under consideration.

We are satisfied, from the pleading and evidence, not only that the freight conductor had no authority to create the relation of master and servant between the company and the plaintiff, but also that he had no intention of establishing any contractual relations between them. On the contrary, it is obvious that what occurred amounted merely to a request by the conductor of an acquaintance to perform a casual service for his accommodation, which was responded to in the same spirit of good fellowship, without either promise or expection of reward.

There are additional grounds of objection suggested, which render the plaintiff's right to a recovery extremely doubtful; but the view already presented is conclusive of the case, and renders the discussion of other questions unnecessary.

We find no reversible error in the record, and the judgment must be affirmed.

Affirmed.

Note.

The question whether a master is liable for injuries, not willful, sustained by a mere volunteer, seems to be presented in the principal case for the first time in this state. And the facts in the case are so plain and the rule of law to be applied to them is so well settled, in other jurisdictions: Rhodes *v.* Georgia R., etc., Co., 84 Ga. 320, 20 Am. St. Rep. 362; Sparks *v.* East Tennessee, etc., R. Co., 82 Ga. 156; Chicago, etc., R. Co. *v.* Argo, 82 Ill. App. 667; Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, 41 Am. Rep. 567; Cincinnati, etc., R. Co. *v.* Finnell (Ky. 1900), 55 S. W. Rep. 902; Evarts *v.* St. Paul, etc., R. Co., 56 Minn. 141, 45 Am. St. Rep. 460; Church *v.* Chicago, etc., R. Co., 50 Minn. 218; Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423; Flower *v.* Pennsylvania R. Co., 69 Pa. St. 210, 8 Am. Rep. 251, that the learned judge of the circuit court did what he is to be highly commended for doing and what is constantly done in the federal courts, though in so doing he violated an ancient rule of practice in this state; he gave binding instructions to the jury, in other words, directed a verdict for the defendant. The court knew full well the effect that the exhibition of an arm, from which the hand had been severed by the alleged negligence of a railroad corporation, would have on the passions of the jury. Why not direct a verdict and thus save the litigants the expense of an appeal or a new trial? Moreover, the action of the court in this case is somewhat defendable by reason of the decision in Chesapeake & Ohio Ry. Co. *v.* Stock, 11 Va. Law Reg. 263, abrogating the scintilla doctrine in Virginia.

There is one qualification to the general doctrine laid down in the principal case, namely: In case of an emergency, a servant may obtain assistance, and in that event it seems that the master will be liable for injuries to the assistant; but no such emergency can exist if there are other servants present who will give the necessary assistance. W. B. Conkey Co. *v.* Bueherer, 84 Ill. App. 663. See Vassor *v.* Atlantic Coast Line R. Co. (N. C.), 7 L. R. A. N. S. 950.